92-2029

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MARIANO ALVARADO,

Petitioner,

v.

COUNTY OF STANISLAUS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the California Court of Appeal created an impermissible conflict between a state statute and federal constitutional, statutory and common law by construing California Government Code section 945.3 so as to deny a plaintiff the right to bring an action against a police officer under 42 United States Code section 1983 in state court at any time from the date of injury through one year after termination of criminal proceedings brought against the plaintiff as a result of the injury-causing incident?

2. Does California Government Code section 945.3, as construed by the California Court of Appeal, violate the Supremacy Clause of the United States Constitution by denying a plaintiff the right to bring an action against a police officer under 42 United States Code section 1983 in state court at any time from the date of injury through one year after termination of criminal proceedings brought against the plaintiff as a result of the injury-causing incident?

PARTIES BELOW

The parties to the proceedings below were Mariano Alvarado, petitioner before this court; County of Stanislaus, a political subdivision of the State of California; Paul Needham and Patrick Kelly. Messrs. Needham and Kelly were sued individually and in their official capacity as officers of the Stanislaus County Sheriffs' Department. The respondents before this court include County of Stanislaus, Paul Needham and Patrick Kelly.

Angela Alvarado, the daughter of petitioner Mariano Alvarado, was a plaintiff in the original complaint filed in Stanislaus County Superior Court. City of Patterson, a political subdivision of the State of California contained within the borders of County of Stanislaus, was also a defendant in the original complaint. Neither party was named in the amended complaint at issue in this Petition; therefore, neither party is named herein.

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_____♦_____

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

_____♦_____

Petitioner Mariano Alvarado respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fifth Appellate District, which became final in the above-entitled proceeding on March 22, 1992.

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OPINIONS BELOW

The decision of the California Supreme Court, filed March 18, 1993, denying petitioner's request for review, has not been published. It is reprinted in the appendix hereto, page A1, *infra*.

The decision of the California Court of Appeal, Fifth Appellate District, denying petitioner's petition for rehearing, has not been published. It is reprinted in the appendix hereto, page A2, *infra*.

The opinion of the California Court of Appeal, Fifth Appellate District, is an unpublished opinion. It is reprinted in the appendix hereto, page A3-A16, *infra*.

The minute order entered by the California Superior Court in and for the County of Stanislaus, is an unpublished decision. The Court's Minute Order, and the subsequently entered Order on Demurrer and Order of Dismissal are reprinted in the appendix hereto, pages A17-A21, *infra*.

JURISDICTION

Petitioner brought this suit on August 31, 1989 in the Superior Court of the State of California, County of Stanislaus, under 42 United States Code section 1983 and the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States. Petitioner also joined common law causes of action for assault and battery, intentional infliction of emotional distress, and

negligent retention and hiring. Petitioner's amended complaint was filed July 30, 1990, and contained the same causes of action.

On January 23, 1991, the superior court granted respondent's demurrer to petitioner's first amended complaint, and the court's order dismissing petitioner's cause of action with prejudice was filed February 6, 1991. Petitioner appealed the superior court's decision dismissing his section 1983 claims. In an unpublished opinion dated December 16, 1992 the California Court of Appeal, Fifth Appellate District, upheld the superior court's dismissal. The California Supreme Court denied review on March 18, 1993. The decision of the Court of Appeal became final on March 22, 1993.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 United States Code section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 United States Code Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

California Government Code Section 945.3:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

* * *

California Code of Civil Procedure Section 340(3):

Within one year:

* * *

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another. . . .

* * *

STATEMENT OF THE CASE

In this litigation, a 59 year-old man, unlawfully arrested and then beaten and injured, has been denied his day in court to vindicate the violation of his civil rights. Petitioner, Mr. Mariano Alvarado, has been barred from pursuing his civil action against the officers and the county that employed them because he filed his civil rights action under 42 United States Code section 1983 in a California state court, together with state tort causes of action, during the pendency of his criminal proceeding and one year and three days after the date of his injuries.

1. Factual Background

On August 28, 1988, petitioner Mariano Alvarado encountered Stanislaus County Sheriff's Deputies Paul Needham and Patrick Kelly during a domestic dispute between Mr. Alvarado's brother and sister-in-law. Mr. Alvarado had persuaded his brother to accompany

officer Kelly to the patrol vehicle when Officer Needham sped up on the scene, violently seized Mr. Alvarado and hit him with a sap,[1] causing permanent injury to Mr. Alvarado's right eye. Mr. Alvarado was then taken into custody and detained for approximately nine hours.

Mr. Alvarado was charged with misdemeanor violations of obstructing a public officer and assault on a peace officer. The arresting officers also charged him with felony battery, but these charges were never filed by the district attorney.

On or about October 11, 1989, Mr. Alvarado was tried on the two misdemeanor charges. As it had been from the start, the account of the event by the two officers at trial was diametrically opposed: Officer Needham testified that he was compelled to use force

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[1] "A 'sap' is more commonly known as a 'blackjack.' [Citation.] It is 'a small striking weapon typically consisting at the striking end of a leather-enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact.'" *Dawkins v. City of Los Angeles*, 22 Cal.3d 126, 138 n. 4, 148 Cal.Rptr. 857, 864 n.4, 583 P.2d 711, 718 n.4 (1978). Possession of a sap or blackjack is a felony in California. CAL. PENAL CODE § 12020 (West 1992). Police officers are exempt from the felony provisions of section 12020, and therefore can carry saps, so long as it is "any equipment authorized for the enforcement of law or ordinance in any city or county." CAL. PENAL CODE § 12002 (West 1992) (Emphasis added). *See* 65 Op. Att'y Gen. 120 (1982) (holding that possession by police officers of blackjacks is lawful if the peace officer is authorized by the head of the officer's law enforcement agency to carry the same). Because Mr. Alvarado's case was dismissed prior to the discovery phase, he has had no chance to determine if Officer Needham was so authorized.

against Mr. Alvarado because Mr. Alvarado was assaulting Officer Kelly, whereas Officer Kelly testified that Mr. Alvarado never touched him during their encounter. On October 13, 1989, Mr. Alvarado was acquitted of all charges in the Stanislaus County Municipal Court.

2. Proceedings Below

On December 29, 1988, Mr. Alvarado filed a government tort claim with the County of Stanislaus, a necessary prerequisite to a civil suit containing state tort causes of action against a public entity in California. CAL. GOV'T CODE § 900, *et seq.* (West 1980 & Supp. 1993). The County rejected the claim on January 3, 1989.

On August 31, 1989, one year and three days after his action had accrued, but prior to the termination of the criminal proceedings on October 13, 1989, Mr. Alvarado filed his original complaint for personal injuries and violation of civil rights. On or about July 3, 1990, Mr. Alvarado filed a first amended complaint for personal injuries and violation of civil rights.[2]

On or about November 19, 1990, respondents herein filed a demurrer to the entire complaint, asserting the complaint was untimely for the following reasons: (1) the personal injury causes of action were filed too early

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[2] The amended complaint was filed prior to service on any defendant; the amendments removed as parties Mr. Alvarado's daughter, the City of Patterson, and all fictitiously named officer-defendants employed by the City of Patterson.

because the complaint had been filed prior to the completion of the criminal proceedings; and (2) the civil rights cause of action was filed too late because it was filed one year and three days from the date of the incident, and was thus barred by California's one-year personal injury statute of limitations contained in California Civil Code section 340(3).

On or about January 23, 1991, the Stanislaus County Superior Court dismissed Mr. Alvarado's complaint without leave to amend. Mr. Alvarado timely appealed the dismissal of the federal civil rights cause of action, urging the California Court of Appeal to clarify that while his state causes of action may be barred pursuant to Government Code section 945.3, the Supremacy Clause of the United States Constitution dictates that a state statute cannot bar the filing of a section 1983 action prior to the termination of a criminal proceeding. Indeed, this very issue had been decided by the Ninth Circuit Court of Appeal in *Harding v. Galceran* (9th Cir. 1989) 889 F.2d 906 *cert. denied sub. nom, Galceran v. Harding*, 111 S.Ct. 951 (1991). Furthermore, petitioner urged the Court of Appeal to adopt the construction given this statute in *Harding*, and to hold, pursuant to the specific wording of section 945.3, that "*[a]ny applicable statute of limitations* for filing and prosecuting [actions against a peace officer or the public entity employing a peace officer based on conduct of the peace officer relating to the offense for which the accused is charged] *shall be tolled* during the period that the charges are pending before a justice, municipal, or superior court." CAL. GOV'T. CODE § 945.3 (West Supp. 1993) (emphasis added).

On or about December 15, 1992 the Court of Appeal upheld the trial court's total dismissal. *See* Unpublished Opinion of the Court of Appeal of the State of California, Fifth Appellate District (hereinafter "Appellate Opinion"), *infra* at pp. A3-A16). The appellate court held that because Mr. Alvarado chose to file his federal civil rights action with state common law claims during the pendency of his criminal proceedings, he was bound by the one-year statute of limitations prescribed in Code of Civil Procedure section 340(3) as to his federal civil rights claim. Appellate Opinion, *infra* at p. A13-A16. Thus, the court held, since his common law claims were "too early" under Government Code section 945.3, and his civil rights action "too late" under Code of Civil Procedure section 340(3), his entire complaint was in essence a nullity. *Id.* The court went on to hold that there was no basis for invoking the tolling provisions of Government Code section 945.3 because Mr. Alvarado was not "disabled" by the barring provision contained in that section, having filed his civil action while the criminal proceedings were still pending. *Id.* (*See* Argument I(A)(1), *infra.*)

On or about December 30, 1992 Mr. Alvarado timely filed a petition for rehearing in the Court of Appeal. A rehearing was denied on January 5, 1993. Thereafter, petitioner timely requested review by the California Supreme Court. On March 18, 1993 Mr. Alvarado's petition for review was denied, with two justices dissenting. The original opinion of the Court of Appeal became final on March 22, 1993.

REASONS FOR GRANTING THIS WRIT

I.
As Construed by the California Court of Appeal, California Government Code Section 945.3 Is In Blatant and Irreconcilable Conflict With Controlling Precedent From This Court and From a United States Court of Appeals

Petitioner has consistently argued before each state court that has passed on his claim that the decision to dismiss his section 1983 action with prejudice is inconsistent with the facts and the reasoning contained in the Ninth Circuit Court of Appeals' decision in *Harding, supra*, 889 F.2d 906. As demonstrated herein, the opinion of the California Court of Appeal is also in direct conflict with the policies and rationale enunciated in this Court's decisions on the issue of state statutes of limitations, including state tolling provisions, and their application to section 1983 causes of action.

A. The *Harding* Decision

In *Harding*, the plaintiff filed a section 1983 action in federal court more than two years after his claims accrued, but within one year after his acquittal on the criminal charges. *Harding*, 889 F.2d at p. 907. Although he also filed pendent state claims for malicious prosecution, those claims were dismissed on summary judgment, and Mr. Harding did not appeal their dismissal. *Id.* at p. 907, n.1. The district court held that Mr. Harding's section 1983 action was barred by the one-year personal injury statute of limitations prescribed

in California Code of Civil Procedure section 340(3). *Id.* at p. 907.

Mr. Harding appealed to the Ninth Circuit Court of Appeals, arguing that his section 1983 action fell under the tolling provision of California Government Code section 945.3, which both prevents civil actions against police officers from being filed while criminal charges are pending against the potential plaintiff, and tolls the statute of limitations on the civil actions until the criminal proceedings terminate. In agreeing with Mr. Harding, the Ninth Circuit stated:

> The [district] court held that because the prohibitory provision of section 945.3 conflicted with the policies behind section 1983, Harding's claims were not tolled by section 945.3's tolling provision. We disagree. We hold that although section 945.3 may not prohibit a potential plaintiff from bringing a section 1983 claim against a peace officer while criminal actions are pending, section 945.3's tolling provision may still apply to toll the limitations period while criminal actions are pending against the potential plaintiff.

Harding, 889 F.2d at p. 908.

To support its decision that *Harding* did not apply to petitioner's case, the California Court of Appeal relied almost exclusively on dictum from *Johnson* v. *City of Chico*, 725 F.Supp. 1097 (E.D. Cal. 1989), a federal district court decision where the district court: (1) issued its opinion one day after the Ninth Circuit's decision in *Harding*, and stated in the text that it was

unaware of any Ninth Circuit authority directly construing section 945.3 (*Johnson*, 725 F.Supp. at p. 1099); and (2) certified for interlocutory appeal pursuant to 28 United States Code section 1292(b) the only question presented in the case--namely, the applicability of California Government Code section 945.3 to the particular section 1983 claim in question.[3] Moreover, *Johnson* has never been cited as authority in any subsequent case construing tolling provisions.

Nevertheless, the California Court of Appeal relied upon *Johnson* and held that a civil rights litigant may either: (a) elect to delay bringing a section 1983 action until after resolution of state criminal proceedings, should the litigant wish to file state claims jointly in a single proceeding; or (b) bring a section 1983 claim within the one-year period prescribed by California Code of Civil Procedure section 340(3) without joining the state claims. Appellate Opinion, *infra* at p. A14-A15 (quoting *Johnson, supra*, 725 F.Supp. at p. 1103). Thus, rather than a "tolling" provision, the California Court of Appeal interpreted California Government Code section 945.3 as forcing potential civil rights plaintiffs faced with criminal prosecution to "elect" the

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[3] The issue before the court in *Johnson* was whether section 945.3's tolling provision tolled the one year statute of limitations for bringing section 1983 actions such that a section 1983 claim brought in federal court, joined with pendent state claims, was still cognizable more than five years after the date of the incident. *Johnson*, 725 F.Supp. at p. 1099. The date of injury was December 23, 1982; the *Johnson* plaintiff timely filed a state tort claim on March 31, 1983. *Id.* at p. 1098. The civil lawsuit was not filed until May, 1988, more than five years from the date of the incident, but less than six months after termination of the criminal proceeding. *Id.* at p. 1098-99.

procedural course and conduct of their civil remedy prior to conclusion of the criminal proceedings.

The ruling by the Court of Appeal affects more than just potential plaintiffs such as Mr. Alvarado, who filed his section 1983 actions during the pendency of his criminal proceedings, but more than one year after accrual of the cause of action. Any complaint filed by a section 1983 plaintiff who waits until the conclusion of criminal proceedings and then brings only a section 1983 action without state claims would also, according to the express holding and rationale of the appellate court's decision, be untimely if the criminal proceeding had concluded more than one year from the date of the incident.[4] Such a holding places the Court of Appeal's decision in direct conflict with the explicit language of section 945.3,[5] as well as with the holding of *Harding*.

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[4] The State has at least one year in which to initiate criminal charges against a criminal defendant (*see* CAL. PENAL CODE § 802(a) (West Supp. 1993). It is in any event common for a criminal proceeding to conclude more than one year after the incident, as it did in Mr. Alvarado's case.

[5] Not only is this "election" construction given section 945.3 by the Court of Appeal in direct conflict with the language of 945.3, it also conflicts with basic principles behind a tolling provision. For example, in *Hardin v. Straub*, 490 U.S. 536, 544, 109 S.Ct. 1998, 2003, 104 L.Ed.2d 582 (1989) Justice Stevens recognized that a Michigan tolling provision (similar to the tolling provision of section 945.3) allowed prisoners to bring an action at any time from the date their claim arises until one year after they are freed from custody. Justice Stevens stated:

> [M]any prisoners are willing and able to file § 1983 suits while in custody. Thus, a State reasonably could decide that

(continued...)

[5](...continued)

there is no need to enact a tolling statute applicable to such suits. Alternatively, a State reasonably might conclude that some inmates may be loath to bring suit against adversaries to whose daily supervision and control they remain subject, or that inmates who do file may not have a fair opportunity to establish the validity of their allegations while they are confined. The Michigan tolling statute reflects a legislative decision to lessen any such difficulties by extending the time in which prisoners may seek recovery for constitutional injuries. Such a statute is consistent with § 1983's remedial purpose. (Footnote omitted).

Hardin v. Straub, supra, 490 U.S. at p. 544.

In contrast, without so much as a whisper regarding legislative intent, the California Court of Appeal has turned section 945.3 into an "election" statute, limiting civil rights plaintiffs' access to remedy. In fact, application of the tolling provision so as to ensure to 1983 plaintiffs a continuous period in which to bring their action, spanning from the date of accrual to one year after the criminal proceedings have concluded, is alone consistent with the purposes behind section 945.3--namely, to prohibit (or at least discourage in the case of section 1983 claims) actions against police officers during criminal proceedings, so as to eliminate the possibility that civil damage actions will be used as leverage in plea bargaining or as a discovery tool to inquire into prosecutorial information while the criminal charge is pending. *See Harding, supra,* 889 F.2d at 908-09; *McMartin v. Los Angeles County,* 202 Cal.App.3d 848, 854-55, 249 Cal.Rptr. 53, 55 (1988).

Examples of the inequity of this "election" construction are abundant. Consider the criminal defendant who originally forgoes bringing suit based on the incident, but changes her mind once criminal charges are filed. If those charges are not filed for six months, this potential civil plaintiff may have already lost her opportunity to file the requisite Government Tort Claim under California Government Code section 900 *et. seq*; under the Court of Appeal decision herein, her

(continued...)

While it is true that in *Harding* the plaintiff waited until after the criminal proceeding had concluded to bring his section 1983 action, Mr. Harding's, like Mr. Alvarado's, federal action was being litigated without pendent state claims. *See Harding*, 889 F.2d at p. 907, n.1.

Additionally, the Court of Appeal's interpretation of *Harding's* holding does not bear up under scrutiny. The Court of Appeals states: "[The *Harding* court] further held that since Harding chose to wait until the criminal proceedings were resolved to proceed with his civil action, he was entitled to the benefit of the tolling provision of Government Code section 945.3, to wit, he had one year from the date of his acquittal on the criminal charges to file his complaint." Appellate Opinion, *infra* at pp. A13-A14 (emphasis added). However, nowhere in *Harding* does the court make dispositive the fact that Mr. Harding filed his section 1983 action after termination of his criminal proceeding.

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[5](...continued)
section 1983 action would also be barred because she would be precluded at the end of the criminal proceeding from joining with it her state tort claims. Additionally, consider the criminal defendant who makes early on the required "election," and decides to wait until the criminal proceeding has concluded to bring his section 1983 action with state law claims. If the criminal proceeding does not conclude for five years (as it did not for the plaintiff in *Johnson v. City of Chico, supra*, 725 F.Supp at p. 1099), valuable evidence could be lost if the plaintiff continued to wait--as the Court of Appeal herein requires--to bring the section 1983 action until the end of the criminal proceeding. Witnesses disappear, memories fade, demonstrative evidence is misplaced: without a civil action on file, there would be no way to preserve this evidence for the civil proceeding.

Nor is it pivotal to the *Harding* decision that Mr. Harding had originally joined pendent state claims to his section 1983 action.[6] Rather, when discussing California Government Code section 945.3, the *Harding* court states simply:

> [Section 945.3] prevents civil actions against peace officers from being filed while criminal charges are pending against the potential plaintiff. The section also tolls the statute of limitations on the civil actions until the criminal charges are resolved.
>
> * * *
>
> Although section 945.3's prohibition on civil actions should not bar a party from bringing a section 1983 action while state criminal charges are pending, it does not necessarily follow that the one-year statute of limitation for section 1983 actions should not be tolled by the tolling rule expressed in section 945.3. Unlike the statute's prohibition on bringing section 1983 claims, the tolling rule is

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[6] In fact, the application of California Government Code section 945.3's tolling provision does not depend on whether the section 1983 action has been joined with pendent state claims or not. Illustrative is the common practice of filing a tort claim (subject to a one year statute of limitations in California) in the same action as a contract claim (subject to a four year statute). Should the tort claim fail because filed more than one year after the injury, the contract claim does not then become a nullity. Rather, the tort claim is severed, and the plaintiff proceeds on the contract claim. Likewise, should a section 1983 plaintiff file, during the pendency of his criminal action, a civil complaint containing both "barred" state tort claims and a section 1983 action, the state tort claims should be severed and the section 1983 action should be allowed to stand. Such a result is logical, just, and practical.

consistent with the objectives behind section 1983 actions. Therefore, the tolling provision does not fall under the Supremacy Clause. . . .

Harding, 899 F.2d at 907-08.

In reaching this conclusion, the Ninth Circuit explicitly disapproved a case upon which the district court in *Harding* had relied: *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D.Cal. 1988), which held that both the barring and the tolling provisions of section 945.3 were inapplicable to section 1983 claims. *Harding*, 889 F.2d at p. 908. *See Mangels*, 678 F.Supp. 1452, 1455. Directly rejecting the *Mangels* holding, the *Harding* court states:

Finally, *and perhaps most importantly*, while a state prohibition against filing an action cannot prohibit a criminal defendant from filing a section 1983 action against a peace officer while the criminal case is pending, *section 945.3 should not be so applied as to force him to do so or lose his cause of action*. The tolling period serves the independent policy objective of *encouraging* the criminal defendant to await the outcome of the criminal action before instituting a section 1983 action. In some cases the delay may result in the avoidance of unmeritorious actions that might otherwise be costly to all concerned. At the same time, in other cases the delay may help render unnecessary the filing of meritorious actions, if the governmental entity is willing to settle the claim after a full exploration of the facts has occurred in a criminal proceeding.

Harding, 889 F.2d at 909 (emphasis added).

The California Court of Appeal's decision does exactly what the *Harding* court specifically proscribes: it forces a plaintiff, who by choice or by happenstance has failed to preserve state law tort claim(s), to bring a section 1983 action alone within one year; failure to do so means a complete loss of any remedy in a California court. Thus, the interpretation the Court of Appeal has given California Government Code section 945.3 is irreconcilable with the *Harding* decision, as well as with the explicit language of section 945.3. Therefore, petitioner's request for a writ of certiorari should be granted.

B. Applicable Decisions of the United States Supreme Court

1. In Its Construction of California Government Code Section 945.3, The California Court of Appeal Does Not Properly Safeguard The Federal Rights Protected by Section 1983 Actions

As the Ninth Circuit recognized in *Harding*, a federal court must look to state law to determine the proper application of tolling provisions. *Harding*, 889 F.2d at p. 907, citing *Board of Regents v. Tomanio*, 446 U.S. 478, 486-87, 100 S.Ct. 1790, 1796-97, 64 L.Ed.2d 440 (1980). In *Tomanio*, a New York statute instructed that "[n]o court shall extend the time limited by law for the commencement of an action." *Tomanio*, 446 U.S. at 486. Finding that, under the facts of the case, New York's law did not defeat the goals of section 1983, this

Court held that a federal court could not apply a federal tolling doctrine that would have preserved Ms. Tomanio's section 1983 action in federal court. *Id.* at 487-92.

Since *Tomanio*, this Court has reaffirmed the mandate that a federal court is to apply state tolling provisions "unless their full application would defeat the goals of the federal statute at issue." *Hardin v. Straub*, 490 U.S. 536, 539, 109 S.Ct. 1998, 2000, 104 L.Ed.2d 582 (1989). In *Hardin*, this Court unanimously overturned a federal appellate court's refusal to apply a Michigan tolling statute that gave a prisoner one year after his incarceration ended to bring a section 1983 claim against prison authorities. *Id.* at p. 543. Summarizing and applying *Tomanio*, the *Hardin* court noted that "[s]ince the State's rules did not defeat either § 1983's chief goals of compensation and deterrence [footnote omitted] or its subsidiary goals of uniformity and federalism, the Court held that Tomanio's suit was time barred." *Hardin*, 490 U.S. at p. 539-40. Likewise, since Michigan's provision giving prisoners additional time to file their 1983 actions enhanced rather than frustrated section 1983's compensation goal, and did not hinder section 1983's interest in deterring official misconduct, the *Hardin* Court required the Michigan federal court to apply the tolling provision. *Id.* at p. 544.

It is not only federal courts that are under a duty properly to apply state laws, such as tolling provisions, to section 1983 claims. "A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of [a] valid excuse." *Howlett By and Through Howlett v. Rose*, 496 U.S. 356,

369, 110 S.Ct. 2430, 2439, 110 L.Ed.2d 332 (1990) (quoting *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387-88, 49 S.Ct. 355, 356-57, 73 L.Ed. 747 (1929). As the *Howlett* Court explained:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted [an] act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from [the State's] own legislature, and should be respected accordingly in the courts of the State.

Howlett, 496 U.S. at p. 371 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912)). In *Howlett*, this Court unanimously held that Florida's sovereign immunity doctrine was not a "valid excuse" for shielding a Florida state school board from liability under section 1983. *Howlett*, 496 U.S. at pp. 377-78. *See also Martinez v. California*, 444 U.S. 277, 284-85, 100 S.Ct. 553, 558-59, 62 L.Ed.2d 481 (1980) (unanimous opinion holding California's attempt to immunize public entities and public employees from liability for parole release decisions was preempted by section 1983 even though the federal cause of action was being asserted in state court).

As these precedents dictate, the proper inquiry for the California Court of Appeal was what construction to give section 945.3 so as to serve the policies underlying section 1983, as explicated in controlling federal law. Instead, the Court of Appeal rationale, at least in part, for converting section 945.3's tolling provision into an

"election" provision in section 1983 actions, was that section 945.3 could not bar Mr. Alvarado from bringing his section 1983 action during the pendency of the criminal proceeding (based on that court's reading of decisions such as *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988)). *See* Appellate Opinion, *infra* at p. A9. According to the Court of Appeal, because Mr. Alvarado was not "disabled" by the barring provision, he could not take advantage of the tolling provision. *Id.* at p. A13.

As noted above, such a limiting reading of section 945.3 was explicitly disapproved in *Harding*. *See Harding, supra*, 889 F.2d at p. 908. *See also supra*, Argument I(A) (discussing the *Harding* court's disapproval of *Mangels v. City of Orange*, 678 F.Supp. 1452 (1988)). Furthermore, to say that Mr. Alvarado was not "disabled" by section 945.3 because he could have brought his section 1983 action during the criminal proceeding is to miss the point. Mr. Alvarado <u>was</u> "disabled" by the very thing that section 945.3 was enacted to deal with: namely, criminal proceedings brought against persons who have been deprived of their civil rights by the very police officers responsible for bringing the criminal charges.

Because the California Court of Appeal has failed to accord California Government Code section 945.3 a construction in keeping with federal law, it is necessary that this Court grant certiorari.

2. The California Appellate Court's Opinion Creates Inappropriate Procedural Distinctions Between the Federal and State Fora.

Given the Ninth Circuit's thoughtful, policy-minded application of this literal statute, as demonstrated in *Harding v. Galceran*, petitioner has no doubt that his section 1983 claim would not have been dismissed if he had simply brought the claim in federal court. Furthermore, federal district courts are uniformly applying the holding and spirit of *Harding* to extend a section 1983 plaintiff's statute of limitations beyond one year. *See Hood v. City of Los Angeles*, 804 F.Supp. 65 (C.D.Cal. 1992) (applying *Harding* to toll the one-year statute of limitations for a section 1983 claim during the time an administrative claim was pending).

As stated in *Felder v. Casey, supra*, 487 U.S. at p. 152, California:

> may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when such claims are brought in federal court, for "'[w]hatever spring the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'"

Were he to have chosen a federal forum, Mr. Alvarado would be litigating the merits of his claim. Instead, in manifest contravention of the remedial

purposes of section 1983, and without any "fair or substantial support" (*Howlett, supra*, 496 U.S. at p. 366), California courts have despoiled him of that opportunity. Therefore, petitioner respectfully requests this Court grant this petition for certiorari.

II.

The California Appellate Court Misconstrues California Government Code Section 945.3's Clearly-Worded Provisions In Such A Way As To Undermine The Purposes of 42 United States Code Section 1983

This Court has consistently emphasized that the essential goal of section 1983 is to "ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55, 104 S.Ct. 2924, 2932, 82 L.Ed.2d 36 (1984). Thus:

> [Section] 1983 provides 'a uniquely federal remedy against incursions. . . upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

Felder, 487 U.S. at 139 (emphasis added).

In *Harding v. Galceran, supra*, 889 F.2d at 908, the Ninth Circuit Court of Appeal quoted from *Felder v. Casey* to adopt emphatically the position consistently taken by this Court; to wit: "A state law that conditions

[a section 1983 plaintiff's] right of recovery upon compliance with a rule designed to minimize governmental liability. . . *is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.*" *Felder*, 487 U.S. at 153 (emphasis added). *See also Howlett, supra*, 496 U.S. at pp. 372, 377-78 (holding that "[s]tates may apply their own neutral procedural rules to federal claims[;] * * * [however,] [t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law"); *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 1943, 85 L.Ed.2d 254 (1985) (declaring that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action").

The *Harding* opinion notes specifically that "the tolling rule [contained in California Government Code section 945.3] is consistent with the objectives behind section 1983 actions." *Harding*, 889 F.2d at 908. *Harding* further provides that:

> Tolling the statutory period while criminal actions are pending gives the party charged more time to file his section 1983 action. Striking down the tolling provision would force a party to defend a criminal action and prosecute a civil action during the same time period. Thus, application of the tolling provision increases a litigant's access to the courts. *Patsy v. Board of Regents*, 457 U.S. 496, 504, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982) (in

enacting section 1983, Congress intended to "throw open the doors of the United States Courts.")

Second, there is no inconsistency between the purposes of section 945.3's tolling provision and the policies of deterrence and compensation embodied in section 1983. Indeed, giving a criminal defendant more time to file his section 1983 action would "ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages. . . ." *Felder*, 108 S.Ct. at 2307.

Third, since federal law requires this court to apply state tolling rules, application of section 945.3's tolling provision ensures consistent adjudication in state and federal courts. *Felder*, 108 S.Ct. at 2308-11.

Harding, 889 F.2d at 909. In contrast to this well-reasoned, Constitutionally supportable decision by the Ninth Circuit, the California Court of Appeal did not even consider the objectives of section 1983 when making its determination. *See* Appellate Opinion, *infra* at pp. A3-A16. Additionally, uniform application of the tolling provision to provide section 1983 plaintiffs with a continuous period in which to bring their action, as was clearly contemplated in *Harding*, is also consistent with the purposes behind state enactment of section 945.3. (*See supra*, Argument I.) Therefore, the opinion of the California Court of Appeal is unsupported by <u>any</u> sound public policy. In fact, the decision is squarely at odds with a policy enunciated by the United States Congress and consistently reaffirmed by this Court for more than a century. Furthermore, the impact of this decision,

although unpublished, will be to close the courthouse doors to many civil rights plaintiffs with cases as egregious than the one Mr. Alvarado is being prevented from bringing, or more so. For these reasons, it is incumbent upon this Court to grant certiorari.

III.
As Construed By The California Appellate Court, California Government Code Section 945.3 Impermissibly Limits A Plaintiff's Access To State Court To Pursue An Action Under 42 United States Code Section 1983 In Violation of the Supremacy Clause of the United States Constitution

As this Court held in *Howlett, supra*,

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum--although both might well be true--but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, supra, 496 U.S. at p. 367.

The Ninth Circuit Court of Appeals grounded its decision in *Harding* on the Supremacy Clause, holding that, although the first paragraph of section 945.3 could not bar a plaintiff's section 1983 claim from being

brought against public officials during the pendency of the criminal proceedings, "the tolling provision in section 945.3 does not fall under the Supremacy Clause and, therefore, should be applied to Harding's claims." *Harding, supra*, 889 F.2d at p. 909. In contrast, the California Court of Appeal decision--left standing by the failure of the California Supreme Court to grant review--fails to acknowledge the application of the Supremacy clause by limiting section 1983 actions without suggesting what policy its ruling might serve. *See* Appellate Opinion, *infra* at pp. A10-A16.

Although petitioner recognizes that the Court of Appeal's decision is unpublished and cannot be cited as precedent (CAL. RULE COURT, Rule 977 (West Supp. 1993)), petitioner suggests that the procedural history of this case reveals a willingness among the judiciary of this most populous State in the Union to limit and restrict plaintiffs seeking relief in its courts under federal civil rights statutes.

A California appellate court can have an enormous impact in shaping section 1983 jurisprudence at the state level, whether by published or unpublished decision. The Fifth District Court of Appeal spans a geographic area encompassing everything from politically isolated farming communities made up primarily of Hispanic inhabitants to large urban areas as ethnically diverse as any in the Nation. State judicial hostility toward section 1983 actions, such as is exhibited by the decision herein, must be checked by this Court to ensure respect for "the supreme Law of the Land." U.S. CONST. art. VI, § 1, cl. 2.

CONCLUSION

This Court has recognized that:

> It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the 1871 Civil Rights Act, which contained 42 U.S.C. section 1983].
>
> * * *
>
> While one main scourge of the evil [prompting the enactment of section 1983]--perhaps the leading one --was the Ku Klux Klan [footnote omitted], the remedy created was not a remedy against it or its members but against those who, representing a State in some capacity, were *unable* or *unwilling* to enforce a state law.
>
> * * *
>
> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to enjoyment of the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 174-80, 81 S.Crt. 473, 477-80, 5 L.Ed.2d 492 (1961) (emphasis added). *See also Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503-505, 102 S.Ct. 2557, 2561-2562, 73 L.Ed.2d 172 (1982) (noting that Congressional enactment of section 1983 was in response to rampant deprivations of civil rights in the Southern States and the inability or

unwillingness of authorities to protect those rights or punish the wrongdoers).

The basic issues facing the Congress that enacted section 1983 are still with us today. Prejudice, passion, neglect and intolerance still operate, subjecting citizens of this country to harsh and abusive treatment by the very agencies set up by the government to protect them. Although failure to enforce state laws against entities such as the Ku Klux Klan may no longer be the pressing focus of a section 1983 action, the current mission of this legislation is no less compelling: to encourage the even-handed treatment by police agencies of all Americans, and to provide remedies when such treatment is denied.

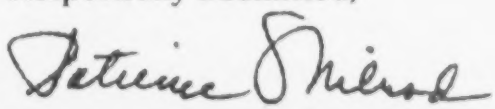
Here, the California Court of Appeal took a plain-language tolling statute and interpreted it to force a criminally-charged section 1983 plaintiff to "elect" the procedural course of his or her civil litigation even before the criminal proceeding has come to an end. Such a construction blatantly and irreconcilably diverges from the language of the statute and from the policies Congress sought to create and protect in enacting section 1983.

The decision by the California Court of Appeal, Fifth Appellate District, and the California Supreme Court's refusal to consider it, make abundantly clear that California courts still require guidance that they may not set a "spring. . . for those who are endeavoring to assert. . . federal rights" in state courts. *Felder, supra*, 487 U.S. at p. 152. As in *Felder*, the question Mr. Alvarado brings to the honorable

justices of this Court is basically one of pre-emption: is the California Court of Appeal's decision compelling a civil rights plaintiff to "elect" the procedural course and conduct of a civil remedy before the conclusion of criminal proceedings "consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'?" *Id.* at p. 138.

As the court of last resort for Mr. Alvarado and the substantial number of plaintiffs like him throughout California who will be affected by decisions such as the one rendered by the Court of Appeal, it is essential that this Court grant certiorari.

Respectfully Submitted,



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APPENDIX

Fifth Appellate District No. F015659
S030931

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Filed March 18, 1993

Mariano Alvarado, Appellant

v.

County of Stanislaus Et Al., Respondents

Appellant's petition for review DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Mosk

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Acting Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MARIANO ALVARADO,	)
	)
Plaintiff and Appellant,	) No. F015659
	)
v.	) (Super. Ct. No. 246379)
	)
COUNTY OF STANISLAUS, et al.,	) ORDER DENYING) PETITION FOR) REHEARING
Defendants and Respondents	)
	) Filed January 5, 1993

THE COURT:

Appellant's petition for rehearing is denied.

Dated: January 5, 1993

Stone (W. A.), Acting P. J.

WE CONCUR:

Ardaiz, J.

Vartabedian, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARIANO ALVARADO,	
Plaintiff and Appellant,	No. F015659
v.	(Super. Ct. No. 246379)
COUNTY OF STANISLAUS, et al.,	**OPINION**
Defendants and Respondents	Filed Dec. 15, 1992 Became Final March 22, 1993

APPEAL from a judgment of dismissal of the Superior Court of Stanislaus County following sustaining of demurrer without leave to amend. Hugh Rose III, Judge.

Milrod & Phillips and Patience Milrod for Plaintiff and Appellant.

Martin, Crabtree, Schmidt & Zeff and Hurl W. Johnson for Defendants and Respondents.

-ooOoo-

Two Stanislaus County Sheriff's Deputies arrested 49-year-old Mariano Alvarado on August 28, 1988. As a result of the arrest, the Stanislaus County District Attorney charged Alvarado in the municipal court with battery on a police officer (Pen. Code, § 243, subd. (b)) and resisting arrest (Pen. Code, § 148).

On December 29, 1988, Alvarado filed a notice of claim (Gov. Code, § 910 et seq.) with the Stanislaus County Board of Supervisors. He alleged the arresting officers assaulted him, causing a loss of his vision. The board of supervisors rejected the claim on December 30, 1988. The notice of rejection advised Alvarado that "[s]ubject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. (See Government Code Section 945.6)."

During the pendency of the criminal charges, on August 31, 1989, Alvarado and his daughter, Angela, filed a complaint for personal injuries and violation of civil rights. The complaint alleged Alvarado sustained physical injuries and Angela suffered emotional distress. The first cause of action alleged assault and battery; the second cause of action alleged intentional infliction of emotional distress; the third cause of

action claimed a willful violation of civil rights by the officers and County of Stanislaus (42 U. S. C. A. § 1983 and the laws and statutes of California); the fourth cause of action alleged the same violation as the third, with named defendants the City of Patterson and specified fictitious defendants, and the fifth cause of action claimed the County of Stanislaus negligently employed and retained the officers. Defendants were not served with this complaint.

On October 13, 1989, a jury found Alvarado not guilty of both counts asserted in the municipal court complaint.

Alvarado filed a first amended complaint on July 30, 1990. The complaint retained the causes of action alleged against Stanislaus County and the officers for assault and battery (first cause of action), intentional infliction of emotional distress (second cause of action), willful violation of civil rights (third cause of action) and negligent employment and retention (fourth cause of action). In essence, the first amended complaint deleted Angela as a named plaintiff and the City of Patterson as a named defendant. Alvarado served the defendants on or about October 25, 1990.

Defendants demurred to the first amended complaint on the ground that all causes of action were

time-barred. They asserted the cause of action under 42 United States Code section 1983 (hereinafter section 1983) in the original complaint was barred by the one-year period of limitation set out in Code of Civil Procedure section 340, subdivision (3), and the same cause of action in the first amended complaint was barred by the same one-year limitation period (Code Civ. Proc., § 340, subd. (3)) and Government Code section 945.6.[1]

The court sustained the demurrer without leave to amend. In its minute order, the court found the original pleading was "an impermissible pleading and of no effect," and the amended complaint was filed in violation of the statutes of limitation set out in Code of Civil Procedure section 340, subdivision (3) and Government Code section 945.6.

Following an "Order on Demurrer" filed February 6, 1991, the court dismissed the action on February 27, 1991.[2]

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1. The only cause of action Alvarado seeks to resurrect in this appeal is the third cause of action (§ 1983) stated in the original and restated in the first amended complaint.

2. In his "Notice of Appeal" filed March 20, 1991, Alvarado purports to appeal from "the order sustaining defendants' demurrer without leave to amend entered herein on February 6, 1991, and from the whole (continued...)

In this appeal Alvarado maintains Government Code section 945.3[3] did not bar his section 1983 cause of action in the original complaint. He cites Harding v.

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[2](...continued)
thereof." An order sustaining a demurrer without leave to amend is not an appealable order; the appeal lies from the subsequent judgment of dismissal of the action. (Yancey v. Fink (1991) 226 Cal.App.3d 1334, 1342.) The appeal here is properly taken from the order of dismissal entered on February 27, 1991.

3. Government Code section 945.3 states:

"No person charged by . . . complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

"Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

"For the purposes of this section, charges pending before a justice, municipal, or superior court do not include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code.

"Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2" (Emphasis added.)

Galceran (9th Cir. 1989) 889 F.2d 906, 908 (cert. den. sub nom., Galceran v. Harding (1991) ___ U. S. ___ [111 S.Ct. 951]) for the proposition that the Supremacy Clause of the United States Constitution forbids application of Government Code section 945.3 to bar early filing of actions brought under section 1983. Alvarado argues the one-year period under Code of Civil Procedure section 340, subdivision (3), by which he was otherwise required to file his section 1983 action, was tolled by Government Code section 945.3 until the criminal charges against him were resolved, so even the first amended complaint was filed timely.

Respondents maintain Harding v. Galceran - which dealt only with section 1983 actions - is distinguishable on its facts. Since Alvarado chose to join federal and state claims in a state action, respondents rely on Johnson v. City of Chico (E.D. Cal. 1989) 725 F.Supp. 1097 for the proposition the pertinent state Tort Claims Act limitation periods apply. Respondents assert the section 1983 action in the original and amended complaint is time-barred.

BACKGROUND - SECTION 1983 ACTIONS

Federal courts have original jurisdiction over actions brought pursuant to section 1983 (28 U.S.C., § 1343(a)(3)(4)); California courts have concurrent jurisdiction with federal courts over actions brought under this section (Brown v. Pitchess (1975) 13 Cal.3d 518, 523; Williams v. Horvath (1976) 16 Cal.3d 834, 837). In a state court claim grounded in the federal Civil Rights Act, any state statutory requirement of filing a notice of claim against the public entity employer is inapplicable. (Felder v. Casey (1988) 487 U.S. 131, 153 [108 S.Ct. 2302, 2314].) While it is constitutionally permissible for a state legislature to place a claims requirement on the state causes of action, the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2) does not permit substantive limitations or impediments, such as the six-month claims deadline set out in Government Code section 911.2, to abrogate the federal remedy. (Williams v. Horvath, supra, 16 Cal.3d at pp. 841-842; Rossiter v. Benoit (1979) 88 Cal.App.3d 706,713, disapproved on another point in Wilson v. Garcia (1985) 471 U.S. 261.)[4]

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4. While there may be considerable overlap between a state action brought pursuant to the Tort Claims Act and a claim under the federal (continued...)

The federal Civil Rights Act has no specified limitations period. In Wilson v. Garcia, supra, 471 U.S. 261, 269, the Supreme Court held the statute of limitations for all section 1983 claims to be the forum state's statute of limitations for personal injury torts. In California, this period is one year (Code Civ. Proc., § subd. (3)). (Usher v. City of Los Angeles (9th Cir. 1987) 828 F.2d 556, 558.) When tolling doctrines are called into question, state law determines their application as well. (Board of Regents v. Tomanio (1980) 446 U.S. 478, 488-491, diverged from on another point in Wilson v. Garcia, supra, 471 U.S. at p. 275.)

DISCUSSION

The Original Complaint

Although the first paragraph of Government Code section 945.3 purports to operate as a bar to Alvarado's filing any civil action against the sheriff's deputies and the County of Stanislaus during the pendency of the criminal charges against him, Harding

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[4](...continued)
Civil Rights Act, the purposes underlying the two are distinct. The state scheme was conceived to limit governmental liability strictly, whereas the federal legislation was designed to ensure an adequate forum and remedy for violations of civil rights. (Williams v. Horvath, supra, 16 Cal.3d at p. 842.)

v. Galceran, supra, 889 F.2d at page 908, specifically held "the provision of section 945.3, which absolutely prohibits a party from bringing a civil action against a peace officer while state criminal charges are pending against that party, is contrary to the purposes of section 1983....[T]he prohibition in paragraph one of section 945.3 must fall under the Supremacy Clause." That being the case, Alvarado was entitled to bring his section 1983 claim within one year following the date of the accrual of the cause of action. The incident giving rise to the complaint occurred August 28, 1988. However, the complaint, which included the section 1983 action, was not filed until August 31, 1989. Thus, Alvarado failed to file the action under section 1983 within the one-year period of limitations (Code Civ. Proc., § 340, subd. (3)).

As for the state claims alleged in the August 31, 1989, complaint, Alvarado had properly protected his state causes of action by filing a timely notice of claim pursuant to Government Code section 911.2 (see ¶ 4 of Gov. Code, § 945.3). Once so protected, the second paragraph of Government Code section 945.3 operated to toll the limitations period for filing and prosecuting the state claims during the period the criminal charges remained unresolved. The criminal charges were resolved on October 13, 1989. Although Alvarado had included the state claims in the original complaint filed

August 31, 1989, those state claims in that complaint were a nullity. The first paragraph of Government Code section 945.3 specifically bars a potential plaintiff from filing his civil action during the pendency of related criminal proceedings. Thus, nothing in the original complaint was filed timely, and that complaint does not support a later amendment to the federal or state causes of action as initially pled.

Alvarado argues "the Supremacy Clause of the United States Constitution, together with the tolling provisions of California Government Code § 945.3, mandate a statute of limitations that begins on the date of the incident and runs until one year from the date on which any criminal charges arising from it are disposed." He cites Harding v. Galceran, supra, 889 F.2d 906, as standing for the proposition that a potential plaintiff may file a section 1983 action "any time up until the tolled one year deadline." Harding is not so expansive.

Plaintiff Harding's encounter with the law enforcement occurred on October 10, 1984; he was acquitted of misdemeanor charges arising out of the incident on May 2, 1986, and filed his civil action one day short of one year thereafter, May 1, 1987. (Harding v. Galceran, supra, 889 F.2d at p. 907.) Unlike Alvarado, Harding chose not to file a section 1983 action until after the criminal proceedings were

resolved. The court held, in part, that Government Code section 945.3 could not prohibit a potential plaintiff from filing during the pendency of the criminal proceedings. It further held that since Harding chose to wait until the criminal proceedings were resolved to proceed with his civil action, he was entitled to the benefit of the tolling provision of Government Code section 945.3, to wit, he had one year from the date of his acquittal on the criminal charges to file his complaint. (Id. at p. 908; cf. Byrd v. Manning (N.J.Super.A.D. 1992) 601 A.2d 770, 775.) He filed within that one-year period.

Here Alvarado chose to file his section 1983 action while the criminal proceedings were pending, as he was entitled to do. But having chosen to proceed, he was then bound by the applicable statute of limitations for section 1983 actions--one year. There is no basis for invoking the tolling provisions of Government Code section 945.3; Alvarado was never "disabled" by the first paragraph of that provision because he chose to file the civil action while criminal proceedings were still pending. As a result, there was no filing period to "toll."

Johnson v. City of Chico, supra, 725 F.Supp. 1097, also cited by Alvarado, is equally unavailing. There the events in question occurred in December 1982 and

Johnson filed his civil action, alleging section 1983 and pendant state tort claims, in May of 1988. (Id. at p. 1099.) The criminal proceedings against Johnson were "'. . . not finally disposed of until less than 6 months before the filing of [the civil] action'" (id. at p. 1098), to wit, the civil action was filed within the period required by the California Government Tort Claims Act. (Id. at p. 1104, fn. 10.) As in Harding, the plaintiff in Johnson waited until the criminal proceedings were resolved before filing his civil action. Pertinent to our analysis here, the district court held "a federal civil rights plaintiff may either (a) elect to delay bringing his federal action pending resolution of state criminal proceedings should he wish to file his pendant state claims jointly with federal claims arising out of the same operative nucleus of facts in a single proceeding; or (b) bring his § 1983 claim in federal court within the one-year period proscribed by § 340(3) without joining the pendent state claims." (Id. at p. 1103.) (Emphasis added.)

The First Amended Complaint

Having once filed a section 1983 claim in an untimely manner, Alvarado makes no reasoned argument why he should be allowed to file a first amended complaint. He chose to file a section 1983 claim while criminal charges were pending, which he

was entitled to do, but missed filing within the applicable statutory period by three days. Harding does not support what he characterizes as a simple "refilling" of the that claim.

As for the state causes of action alleged in the amended complaint which are not at issue here, Alvarado did not file the first amended complaint until July 30, 1990, a date beyond the six-month period following the resolution of the criminal proceedings. (Gov. Code, §§ 945.3, 945.6, subd. (a) (1).)[5] Thus, they were time-barred. Even assuming, arguendo, Alvarado should have been afforded a second attempt at his section 1983 claim, he missed the statute of limitations again under the analysis in Johnson v. City of Chico, supra, 725 F. Supp. at pages 1103 and 1104, footnote 10.

---

5. Government Code section 945.6 states in part: "(a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b) [none applicable here], any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with. . . Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced: [¶] (1) If written notice [of rejection of claim] is given in accordance with Section 913, not later than six months after the date such notice is personally delivered or deposited in the mail."

DISPOSITION

Judgment affirmed. Costs on appeal to respondents.

Stone (W.A.), Acting P.J.

WE CONCUR:

Ardaiz, J.

Vartabedian, J.

SUPERIOR COURT, STATE OF CALIFORNIA,
COUNTY OF STANISLAUS

Mariano Alvarado vs County of Stanislaus
Nature of Hearing: Decision Re: Demurrer
No. 246379
Judge: HUGH ROSE III Bailiff:
Date Jan. 28. 1991
Clerk: Judy Stillwell Reporter:
Modesto, California

APPEARANCES:

This matter came on regularly for hearing January 23, 1991, with Carol [sic] Phillips appearing on behalf of the Defendant [sic] and Hurl Johnson appearing on behalf of the Defendant.

Arguments were presented and the matter was submitted.

After due consideration, IT IS ORDERED the Demurrer is SUSTAINED without leave to amend.

The Court finds the original complaint is an impermissible pleading and of no effect.

The Amended Complaint is untimely filed in accordance with Section 945.6 CCP and Section 340(e) CCP.

The 4th cause of action is not barred because of failure to comply with Government Code Section 911.2. See White v. Superior Court 275 Cal Reporter 706 December 5, 1990.

Defendant shall recover costs.

MINUTE ORDER

LAW OFFICES OF
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Attorneys for Defendants
COUNTY OF STANISLAUS, PAUL NEEDHAM,
PATRICK KELLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

MARIANO ALVARADO,	)
	)
Plaintiff,	) No. 246379
	)
v.	) ORDER ON
	) DEMURRER
COUNTY OF	)
STANISLAUS, et al.,	)
	) Hrng. Date: 1-23-91
Defendants.	)
	) Department: 5

The demurrer of defendants COUNTY OF STANISLAUS, PAUL NEEDHAM and PATRICK KELLY came on regularly for hearing before the Honorable HUGH ROSE III on January 23, 1991. Hurl W. Johnson appeared on behalf of defendants and Carol [sic] Phillips appeared on behalf of plaintiff. After documentary and oral arguments presented, the

matter was submitted to the court and after due consideration, the court makes the following order:

IT IS ORDERED that the demurrer is sustained without leave to amend as to all causes of action.

The court finds the original complaint is an impermissible pleading and has no effect.

The amended complaint is untimely filed and therefore barred by reasons of the statute of limitations of Government Code section 945.6 and Code of Civil Procedure section 340 (3).

The court further finds that the fourth cause of action would not be time barred for failure to comply with Government Code section 911.2. See White v. Superior Court 275 Cal.Rptr. 706, December 5, 1990. However, the fourth cause of action is barred by reason of Government Code section 945.6 and Code of Civil Procedure 340 (3).

IT IS THEREFORE ORDERED that the first amended complaint is therefore sustained without leave to amend and the case is hereby dismissed with prejudice and defendants are awarded costs.

Dated: Feb. 05 1991

HUGH ROSE, III
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA, COUNTY STANISLAUS

MARIANO ALVARADO,	)
	)
Plaintiff,	) No. 246379
	)
v.	) ORDER OF
	) DISMISSAL
COUNTY OF	)
STANISLAUS, et al.,	)
	) Hrng. Date: 1-23-91
Defendants.	)
	) Department: 5

On January 23, 1991 the HONORABLE HUGH ROSE, III sustained the demurrer of defendants COUNTY OF STANISLAUS, PATRICK KELLY and PAUL NEEDHAM without leave to amend as to all plaintiffs. The plaintiffs appearing through counsel MILROD & PHILLIPS and defendants appearing through counsel HURL W. JOHNSON and after the

matter was submitted to the court, the court sustained the demurrer without leave to amend.

In accordance with said order, IT IS HEREBY ADJUDGED, ORDERED AND DECREED that dismissal be entered in this matter as to all causes of action of plaintiffs.

DATED: FEB 26 1991

HUGH ROSE, III
Judge of the Superior Court

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

Alvarado, Mariano
vs.
County of Stanislaus, Et Al
Needham, Paul
F015659
Stanislaus County No. 246379

* * * REMITTITUR * * *

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California, for the Fifth Appellate District, do hereby certify that the original opinion or decision entered in the above-entitled cause on December 15, 1992 has now become final.

__Appellant(s) _x_ Respondent(s) to recover costs
__Each party to bear own costs
__Costs are not awarded in this proceeding

WITNESS my hand and the seal of the Court affixed at my office on March 22, 1993

KEVIN A. SWANSON, Clerk

ANTHONY LAURIA
Deputy Clerk

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

No. 92-2029

In The

Supreme Court of the United States

October Term, 1993

MARIANO ALVARADO,

Petitioner,

v.

COUNTY OF STANISLAUS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Fifth Appellate District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner has raised two questions which are neither relevant nor material to the facts at issue. In fact, there is no real issue to even be reviewed by a writ of certiorari. If an issue is to be presented, the question is more appropriately fashioned as follows:

On the basis of the procedural history presented, does the California Court of Appeal decision, interpreting the tolling doctrine of California Government Code §945.3, conflict with a party's right to bring a §1983 action depriving them of their right to litigate such action?

PARTIES BELOW

The parties to the proceedings below were Mariano Alvarado, petitioner before this court, County of Stanislaus, a political subdivision of the State of California; Paul Needham and Patrick Kelly. Messrs. Needham and Kelly were sued individually and in their official capacity as officers of the Stanislaus County Sheriff's Department. The respondents before this court include County of Stanislaus, Paul Needham and Patrick Kelly.

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No. 92-2029

In The

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October Term, 1993

MARIANO ALVARADO,

Petitioner,

v.

COUNTY OF STANISLAUS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Fifth Appellate District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents COUNTY OF STANISLAUS, DEPUTY PAUL NEEDHAM and PATRICK KELLY hereby submit that a Writ of Certiorari should not be granted in this case because the tolling provision of §945.3, as interpreted by the California Court of Appeal, is consistent with the decisions of this Court, the decisions of lower federal courts, and the policies underlying 42 U.S. Code §1983.

STATUTES

California Government Code §945.3:

"No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing the peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court."

* * *

California Government Code §945.6:

"(a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) If written notice is given in accordance with Section 913, not later than six months after the date such notice is personally delivered or deposited in the mail."

* * *

STATEMENT OF THE CASE

This Petition seeks review of the decision of the California Court of Appeal, Fifth Appellate District, holding that because Petitioner MARIANO ALVARADO filed his complaint under 42 U.S. Code §1983 after the one year California personal injury statute of limitations had run, but while criminal proceedings were still pending against him, he was not entitled to the tolling effect of California Government Code §945.3, and was therefore time barred. The Court of Appeal affirmed the Trial Court's Judgment of Dismissal, which was entered after the sustaining of a Demurrer to Petitioner's Complaint without leave to amend. This memorandum will show that the decision by the Appellate Court is not in conflict with federal law and there is therefore no basis for granting a writ of certiorari.

1. Factual and Procedural History

On August 28, 1988, Petitioner MARIANO ALVARADO (hereinafter "Petitioner") was arrested for assault on Stanislaus County Sheriff's Deputy Paul Needham (Penal Code §243(3)) and resisting and delaying a peace officer (Penal Code §148), both being misdemeanor violations. Both violations resulted after the petitioner was repeatedly warned he would be arrested and that he was interfering with their attempts to arrest another. The situation was a near riot and the petitioner was advised he was being placed under arrest. He resisted and was struck by a sap, a lawful weapon for the peace officer, who utilized the sap to overcome the physical resistance.

On December 29, 1988, Petitioner filed a Notice of Claim with Stanislaus County. Petitioner's claim was rejected on January 3, 1989.

On August 31, 1989, while the criminal charges were still pending, Petitioner and his daughter, Angela Alvarado, filed a Complaint in Stanislaus County Superior Court against the County of Stanislaus, the two Sheriff's Deputies involved in the incident (hereinafter collectively "Respondents"), and others. The First, Second and Fifth Causes of Action alleged state claims for assault and battery, intentional infliction of emotional distress, and negligent employment and retention. The Third Cause of Action alleged civil rights violations pursuant to Title 42 U.S. Code §1983 (hereinafter "§1983") against Respondents, and the Fourth Cause of Action alleged §1983 violations against the City of Patterson and Doe Defendants. Respondents were never served with this complaint.

On October 13, 1989, a jury trial on the charges against Petitioner resulted in a verdict of not guilty on both counts.

Petitioner filed a First Amended Complaint on July 30, 1990. The causes of action alleged against Respondents remained unchanged. The only changes from the original complaint were deletion of Petitioner's daughter as a plaintiff, and deletion of the City of Patterson and the Does as defendants.

Respondents appeared by demurring to the Complaint and First Amended Complaint on the grounds that each of the causes of action was time barred by the statute of limitation contained in California Code of Civil

Procedure §340(3), and Government Code §945.6. Oral argument was presented by the parties. The Superior Court sustained the Demurrer without leave to amend and the action was dismissed. The California Court of Appeal heard oral arguments and on December 15, 1992, affirmed the Superior Court's Judgment of Dismissal. The California Supreme Court denied a Petition for Review on March 18, 1993, and this Petition followed.

The decisions of the respective courts are set forth in Appendix A1 of Petitioner's moving papers.

SUMMARY OF RELEVANT EVENTS

Event	Date
Date of Incident	8-28-88
Plaintiff files claim against County of Stanislaus	12-29-88
Claim Rejected by County	1-3-89
Plaintiff files original complaint (not served on defendants)	8-31-89
Criminal case adjudicated	10-13-89
Plaintiff files first "amended" complaint	7-30-90

ARGUMENT FOR DENYING WRIT

I.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE BECAUSE THE TOLLING PROVISION OF §945.3, AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL, IS CONSISTENT WITH THE DECISIONS OF THIS COURT, THE DECISIONS OF LOWER FEDERAL COURTS, AND THE POLICIES UNDERLYING 42 U.S. CODE §1983

As the court is well aware:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."
>
> *S.Ct. Rule 10.1*

As discussed below, the California Court of Appeal's Decision in this case is consistent with the decisions of this court, the lower federal courts that have considered the issue, and the policies underlying 42 U.S. Code §1983. Because this case does not present a conflict in the decisions of the California Court of Appeal and federal courts (S.Ct. Rule 10.1(b)), and because it does not involve a question of first impression (S.Ct. Rule 10.1(c)), this petition for a writ of certiorari should be denied.

This case raises the question of for whom the time tolls. The answer is that in §1983 actions filed in Federal or State Courts in California, California's one year personal injury tort statute of limitations is tolled for plaintiffs who file their complaint after the termination of pending criminal proceedings. As discussed below, the Court of Appeal's Decision is entirely consistent with

Federal Court decisions considering this issue and the policy underlying §1983 actions. For these reasons, the principles applied by the Court of Appeal in this case are not inconsistent with any federal law and, accordingly, a Writ of Certiorari would be inappropriate in this case.

As the Court of Appeal recognized, pursuant to directive by Congress and decisions of this court, the statute of limitations applicable to Petitioner's §1983 claim is California's one-year statute of limitations for personal injury torts. *Board of Regents v. Tomanio*, 446 U.S. 478, 484-485, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980); *Wilson v. Garcia*, 471 U.S. 261, 275-280, 105 S.Ct. 1938, 1946-1949, 85 L.Ed.2d 254 (1985); *Usher v. City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987); California Code of Civil Procedure §340(3). In addition, the Court of Appeal recognized that state tolling doctrines are applied in §1983 actions so long as those rules are not inconsistent with principles of Federal law. *Tomanio, supra*, 446 U.S., at 487, 100 S.Ct. at 1796; *Hardin v. Straub*, 490 U.S. 536, 538-539, 109 S.Ct. 1998, 2000-2001; 104 L.Ed.2d 582 (1989). In arriving at this conclusion, the *Tomanio* court approvingly quoted the following language from *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975):

> " 'Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests

> in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.' "
>
> *Tomanio, supra,* 44 U.S., 485-486, 100 S.Ct., 1795-1796.

The court made the following comment regarding evaluation of the consistency between state rules and the policies underlying §1983:

> "In order to gauge consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared. On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities."
>
> *Tomanio, supra,* 44 U.S., 487, 100 S.Ct., 1796.

Thus, the question at hand is whether the Court of Appeal's application of the tolling provision in California Government Code §945.3 (hereinafter "§945.3") is consistent with federal law. The Ninth Circuit Court of Appeals considered application of §945.3 to §1983 claims in *Harding v. Galceran,* 889 F.2d 906 (9th Cir. 1989).

In *Harding,* the incident giving rise to plaintiff's cause of action occurred on October 10, 1984. On May 2, 1986, the plaintiff was acquitted of criminal charges brought as a result of the incident. On May 1, 1987, the

plaintiff filed a complaint in a United States District Court alleging §1983 violations. The Ninth Circuit first held that the stay provision of §945.3 could not be applied to §1983 claimants under the supremacy clause since its provisions were inconsistent with the purpose of §1983 actions. *Id.* at 908. In holding that the tolling provision of §945.3 was not inconsistent with the purposes of §1983, the court said:

> "Tolling the statutory period while criminal actions are pending gives the party charged more time to file his §1983 action. Striking down the tolling provision would force a party to defend a criminal action and prosecute a civil action during the same time period. Thus, application of the tolling provision increases a litigant's access to the courts. [citation.]. . . .
>
> "Finally, and perhaps most importantly, while a state prohibition against filing an action cannot prohibit a criminal defendant from filing a §1983 action against a peace officer while the criminal case is pending, §945.3 should not be so applied as to force him to do so or lose his cause of action. *The tolling period serves the independent policy objective of encouraging the criminal defendant to await the outcome of the criminal action before instituting a §1983 action.* In some cases the delay may result in the avoidance of unmeritorious actions that might otherwise be costly to all concerned. At the same time, in other cases the delay may help render unnecessary the filing of meritorious actions, if the governmental entity is willing to settle the claim after a full exploration of the facts has occurred in a criminal proceeding." *Id.* at 909. [emphasis added.]

Consistent with the policies underlying the statute, and implicit in the Ninth Circuit's Decision, §945.3's tolling provision applies only to §1983 plaintiffs who wait until after pending criminal proceedings have terminated to file their complaint. As the court in *Harding* observed, such an application of §945.3 does not limit a §1983 plaintiff's access to the courts. Rather, the tolling provision gives a § 1983 claimant who waits until criminal proceedings have terminated more time to file his cause of action.

The California Court of Appeal's Decision is entirely consistent with the *Harding* decision and the policies of §1983. Under its decision, a § 1983 litigant may not be prevented from filing a complaint within the one-year period of limitations for personal injury torts if he so chooses. If the plaintiff does not wish to litigate his civil claim contemporaneously with pending criminal proceedings, he may wait until those proceedings have terminated to file his complaint. Petitioner in this case did not file within one year of the incident giving rise to his cause of action, and did not wait until the criminal proceedings against him had terminated to file his complaint. The California Court of Appeal concluded that his complaint was barred by the one-year statute of limitations. Because this application of §945.3's tolling provision is consistent with the purposes of §1983, the Court of Appeal's decision should be left undisturbed.

As noted in the Appellate Court Decision:

> "Here Alvarado chose to file his section 1983 action while the criminal proceedings were pending, as he was entitled to do. But having chosen to proceed, he was then bound by the

> applicable statute of limitations for section 1983 actions – one year. There is no basis for invoking the tolling provisions of Government Code section 945.3; Alvarado was never 'disabled' by the first paragraph of that provision because he chose to file the civil action while criminal proceedings were still pending. As a result, there was no filing period to toll."

Petitioner's argument that the Court of Appeal did not apply *Harding*, but rather "relied almost exclusively" on *Johnson v. City of Chico*, 725 F.Supp. 1097 (E.D. Cal. 1989), distorts the Court of Appeal's Decision. In *Johnson*, the incident giving rise to the cause of action occurred on December 23, 1982. The plaintiff filed his complaint in May of 1988, alleging §1983 violations as well as pendent state claims. The District Court held that since §945.3 forestalled filing of the plaintiff's state claims until criminal proceedings had terminated, failure to apply the tolling provision to §1983 actions would violate the supremacy clause since, as a result, the federal courts would be deprived of pendent jurisdiction over the state claims. *Id.* at 1103. Therefore, the court construed the statute so that a federal civil rights plaintiff may either:

> "(a) elect to delay bringing his federal action pending a resolution of state criminal proceedings should he wish to file his pendent state claims jointly with federal claims arising out of the same operative nucleus of facts in a single proceeding; or (b) bring his §1983 claim in federal court within the one-year period prescribed by §340(3) without joining the pendent state claims." *Id.*

The policy of applying the tolling provision of §945.3 to §1983 claims to ensure that federal courts will have jurisdiction over a plaintiff's pendent state claims is not directly in issue here. However, the *Johnson* decision underscores the rationale of the Ninth Circuit's Decision in *Harding* and the decision of the California Court of Appeals in this case. The principal to be gleaned from *Johnson* is that, under California law, the §945.3 tolling provision does not come into play, and has no application, unless the plaintiff waits until criminal proceedings have terminated to file his complaint. Again, as the court in *Harding* observed, this application of the tolling provision of §945.3 is perfectly consistent with the policies underlying §1983 since it provides the litigant with greater access to the courts.

The Court of Appeal's interpretation of the tolling provision of §945.3 in this case is consistent with the decisions in *Harding* and *Johnson*. Its decision recognizes that as a prerequisite to application of the tolling provision, the plaintiff must wait until termination of pending criminal proceedings to file his complaint. That is the California tolling doctrine applicable in the instant case. Because Petitioner chose to file his cause of action while criminal proceedings were pending against him, he is not entitled to the benefit of the tolling provision of §945.3. Therefore, the one-year statute of limitations contained in Civil Code §340(3) applies. Since Petitioner filed his complaint more than a year after the incident alleged in his complaint, it was time barred.

CONCLUSION

Petitioner's argument misses two very fundamental points. First, the tolling provision of §945.3 does not apply unless the plaintiff has waited until the termination of pending criminal proceedings to file his complaint. This prerequisite is clearly set forth in the reasoning and rationale of the District Court's Decision in *Johnson*, the Ninth Circuit's Decision in *Harding*, and the Court of Appeal's Decision in this case.

Second, application of the tolling doctrine does not in any way exclude §1983 plaintiffs from California courts. Rather, §945.3 provides the §1983 plaintiff with the additional opportunity to initiate litigation of his cause of action after criminal proceedings have terminated. The §1983 plaintiff is given the benefit of the one-year statute of limitations for personal injury torts, and, if he so chooses, the tolling provisions of §945.3.

The tolling provision of §945.3, as interpreted and applied by the California Court of Appeal in this case, does not conflict with any principle of federal law. Petitioner has repeatedly failed to abide by the applicable statutes of limitations. Petitioner elected to file an action for alleged §1983 violations while criminal proceedings were pending. Petitioner had a right to do so as clearly set forth by case law. Petitioner filed that action late and is time barred. The lack of diligence by petitioner is not a basis for conflict. Petitioner, realizing the fact that the §1983 action was time barred, then attempted to file an "amended complaint", adding nothing to the allegations in an attempt to boot strap a "relation back" argument.

The courts properly found that amendment to be a nullity. Petitioner then failed to properly proceed by timely filing the state causes of action and §1983 action within the six month limitation period after termination of criminal proceedings provided for by Government Code §945.6.

In summary, Petitioner has failed to set forth any issues that would justify a review of any supposed conflict to grant the petition. The only thing that Petitioner has shown is a lack of diligence in prosecution, and Petitioner cannot use tolling provisions as a shield to seek affirmative relief without also being subject to the realities imposed in failing to timely comply with the time requirements of the appropriate statute of limitations.

Respectfully submitted,

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